

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

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**P & M SERVICES, INC.,**

**Plaintiff,**

**v.**

**ANDRE LAVALLEE,**

**Defendant.**

**Civil Action No.  
04-40173-FDS**

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**MEMORANDUM AND ORDER ON MOTION TO DISMISS**

**SAYLOR, J.**

On August 27, 2004, plaintiff P & M Services, Inc. ("P & M") filed suit against defendant Andre Lavallee for patent infringement and inducement of patent infringement under 35 U.S.C. §§ 271(a) and (b). Lavallee moved to dismiss both counts pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

In connection with the motion to dismiss, both parties have submitted evidence relating to matters outside the pleadings. Accordingly, the Court will convert the motion to dismiss into a motion for summary judgment under Fed. R. Civ. P. 56. *See* Fed. R. Civ. P. 12(b) ("If, on a motion . . . to dismiss . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56").

P & M has moved under Fed. R. Civ. P. 56(f) for an opportunity to take discovery, and has attached an affidavit from its counsel stating that it needs to take certain discovery, including, but not limited to, a deposition of Lavallee, in order to properly oppose the motion for summary

judgment.<sup>1</sup> Opposition Memorandum, Exhibit A. The Court agrees with P & M that the summary judgment motion raises issues of material fact that cannot be adequately addressed without an opportunity for discovery. Therefore, Lavallee's motion for summary judgment pursuant to Fed. R. Civ. P. 56 is DENIED without prejudice pursuant to Rule 56(f).

**So Ordered.**

/s/ F. Dennis Saylor  
F. Dennis Saylor IV  
United States District Judge

Dated: April 13, 2005

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<sup>1</sup> Rule 56(f) provides in full:

Should it appear from the affidavits of the party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.